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No. 96-6867

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In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. Did this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994) – which recognized that when a prosecutor seeks to establish future dangerousness before a capital sentencing jury, due process entitles the defendant to rebut by presenting information regarding his parole ineligibility – announce a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), which cannot be applied to final state-court convictions?

2. If *Simmons* announced a "new rule," does it fall within the second exception to *Teague*, which allows for the retroactive application of procedural rules that protect the fundamental fairness and accuracy of criminal proceedings?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are reported at 95 F.3d 1214 and 1255. (J.A. 222 and 321.) There is no panel decision of the court of appeals. The opinion of the district court is not officially reported. (J.A. 138.)

JURISDICTION

On September 10, 1996, the court of appeals entered judgment reversing the order of the district court to the extent it granted habeas relief, and affirming it to the extent it denied habeas relief. 95 F.3d 1214. (J.A. 222.) Petitioner filed a timely petition for certiorari, which this Court granted on December 19, 1996. 117 S. Ct. 631. (J.A. 345.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Fourteenth Amendment to the United States Constitution. It also involves Va. Code Ann. § 53.1-151(B1). (Pet. Appendix 181a-86a.)

STATEMENT OF THE CASE

A. Trial Court Proceedings

Joseph O'Dell was convicted of capital murder in the death of Helen Schartner. During the penalty phase of

O'Dell's trial, the prosecution sought to establish O'Dell's future dangerousness. It asked the jury to impose a sentence of death on the ground that mere imprisonment was ineffective to curb O'Dell's criminal behavior, and nothing short of death would prevent O'Dell from committing future crimes. The prosecution highlighted O'Dell's past releases on parole, made repeated references to the fact that O'Dell was under the supervision of a Virginia parole officer at the time of Helen Schartner's death, and gave the jury the impression that, if O'Dell were sentenced to life imprisonment rather than death, he might again be paroled and commit other offenses. In the prosecution's brief cross-examination of O'Dell, the words "parole" and "release" were used seventeen times.[1] Thereafter, the prosecutor made the following remarks in a closing argument:

> Isn't it interesting that he is only able to be *outside of the prison system* for a matter of months to a year and a half before something has happened again?

(J.A. 61) (italics added).

> [Y]ou may still sentence him to life in prison, but I ask you ladies and gentlemen in a system, in a society that believes in its criminal justice system and its government, *what does this mean*?
>
> . . . .

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[1] The cross-examination of O'Dell appears on pages 139-54 of the September 11, 1986, trial transcript and is reprinted in full on pages 2437-52 of Volume 5 of the Joint Appendix submitted to the court of appeals below.

> I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. *Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.*

(J.A. 66) (italics added).

Contrary to the suggestions of the prosecution, however, if O'Dell had been sentenced to life imprisonment rather than death, he would never have been "outside of the prison system." He would have been absolutely ineligible for parole in Virginia. Va. Code Ann. § 53.1-151(B1). O'Dell, who represented himself at trial, requested that the court instruct the jury that he would be ineligible for parole. (J.A. 3, 36-37.) The trial court denied O'Dell's request. (J.A. 42-43.) O'Dell also sought to testify in direct examination that he would be ineligible for parole. (J.A. 53-54.) The trial court excluded this testimony. (J.A. 54.)

As the prosecution requested, the jury specifically found that there was "a probability that [O'Dell] would commit criminal acts of violence that would constitute a continuing serious threat to society . . . " (J.A. 69), which is a statutory aggravating factor in Virginia, Va. Code Ann. § 19.2-264.2(1), and the jury fixed the sentence at death.[2]

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[2] As a second aggravating factor, the jury found that the crime was "outrageously wanton, vile or inhuman." (J.A. 69.) On direct appeal, however, the Virginia Supreme Court determined that "the jury did not base its verdict on the vileness

In short, O'Dell's sentencing proceeding was indistinguishable from the one in *Simmons v. South Carolina*, 512 U.S. 154 (1994), where this Court held that a defendant who is not eligible for parole has a due process right to rebut a claim of "future dangerousness" by making his parole ineligibility known to the sentencing jury. O'Dell's case is one of those cited in *Simmons* as being contrary to the result *Simmons* reached. *Id.* at 168 n.8. Indeed, this case is a more egregious case than *Simmons* was, because of the prosecution's outrageous exploitation of the phantom possibility of "parole."

B. Direct Appeal and State Habeas Proceedings

On direct appeal, O'Dell argued, among other things, that the trial court's refusal to permit him to rebut the prosecution's claim of future dangerousness by informing the jury that the alternative to death was life without parole violated the " 'elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." ' *Skipper* [v. *South Carolina*, 476 U.S. 1, 5] n.1 [(1986)], *quoting Gardner v. Florida*, 430 U.S. 349, 362 (1977)." Appellant's Brief in Chief, *O'Dell v. Commonwealth*, at 73. The Virginia Supreme Court rejected this argument and affirmed O'Dell's conviction and sentence in all respects. 234 Va. 672, 364 S.E.2d 491 (1988). (J.A. 73.) On October 3, 1988, this Court denied review, 488 U.S. 871, thereby making O'Dell's conviction final. This date is

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predicate," 364 S.E.2d at 507 (J.A. 108), and it therefore refused to consider O'Dell's claim challenging the trial court's instruction on the vileness factor, *id.*

prior to the decision in *Simmons*, but subsequent to the decisions in *Gardner* and *Skipper*.

O'Dell unsuccessfully sought habeas relief from the Virginia state courts. (J.A. 118-31.) This Court declined to review the denial of state habeas relief. *O'Dell v. Thompson*, 502 U.S. 995 (1991). (J.A. 132.) Justice Blackmun wrote a separate concurrence for himself, Justice Stevens and Justice O'Connor "to underscore the importance of affording petitioner meaningful federal habeas review." *Id.* at 995, 996-97 n.3. (J.A. 132, 134-35.)

C. Federal Habeas Proceedings

1. The District Court Decision

After exhausting his state-court remedies, O'Dell sought federal habeas relief. His petition, filed before *Simmons* was decided, alleged that "when, as here, the *prosecution* seeks to mislead the jury as to sentencing [, a]ccuracy demands that a defendant be permitted to rebut, deny and explain information offered by the prosecution," Petition for a Writ of Habeas Corpus (No. CL89-1475), at 108, ¶ 258 (citing *California v. Ramos*, 463 U.S. 992, 1009 n.23 (1983), and *Gardner*); that "denying O'Dell his right to rebut this false implication ['that O'Dell would be released if given life imprisonment'] was also a blatantly unconstitutional denial of his right to due process," *id.* at 109, ¶ 261; and that "in light of Virginia's inclusion of a defendant's future dangerousness as an aggravating factor . . . , fundamental fairness unquestionably required that O'Dell have the opportunity to rebut inaccurate information offered by the prosecution

as evidence of that aggravating factor," *id.* at 110, ¶ 262.[3] *Simmons* was decided on June 17, 1994, while the federal habeas petition was pending.

In an Order and Memorandum Opinion dated September 6, 1994, the United States District Court for the Eastern District of Virginia applied *Simmons*, holding that the trial court's refusal to allow O'Dell to rebut the prosecution's contention of future dangerousness by informing the sentencing jury of his parole ineligibility deprived O'Dell of due process and subjected him to cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. (J.A. 220.)

The district court held that this Court's decision in *Simmons* was compelled by its previous decisions in *Gardner* and *Skipper*, that it therefore did not announce a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and that it could be applied to O'Dell's final conviction. (J.A. 199-201.) The district court further held that the constitutional error had a "substantial and injurious effect or influence" on the jury's decision to impose a death sentence. (J.A. 201-02, 220, quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).) Accordingly, the district court granted the writ of habeas corpus and remanded the case to state court for a new sentencing proceeding. (J.A. 221.)

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[3] The Petition for a Writ of Habeas Corpus is reproduced in full on pages 27-176 of Volume 1 of the Joint Appendix submitted to the court of appeals below.

2. The Court of Appeals Decision

The Commonwealth appealed from the district court's order to the extent it granted habeas relief on the *Simmons* claim, and O'Dell cross-appealed to the extent it denied habeas relief on his other claims. The appeals were argued before a three-judge panel of the United States Court of Appeals for the Fourth Circuit. Prior to the issuance of any panel decision, the court of appeals ordered reargument before the full court *en banc*.

In a decision dated September 10, 1996, the *en banc* court of appeals reversed the district court's order to the extent it invalidated O'Dell's death sentence, and affirmed it to the extent it denied habeas relief. 95 F.3d at 1218. (J.A. 224.) Although no judge questioned that O'Dell's sentencing proceeding ran afoul of *Simmons*, the court held, by a vote of 7-6, that *Simmons* announced a "new rule" that could not be retroactively applied to O'Dell's sentence. *Id.*

The court of appeals majority acknowledged that a plurality of this Court expressly stated in *Simmons* that the result there was "compel[led]" by the Court's previous decisions in *Gardner* and *Skipper*, which were issued prior to O'Dell's conviction becoming final in 1988. 95 F.3d at 1235 (quoting *Simmons*, 512 U.S. at 165 (plurality opinion)). (J.A. 267-68.) Indeed, the majority conceded that,

> [w]ere *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

95 F.3d at 1225. (J.A. 241.)

Nevertheless, the court of appeals majority concluded that *Simmons* represents "the paradigmatic 'new rule.' " 95 F.3d at 1218. (J.A. 224.) To reach this conclusion, the majority relied principally on this Court's previous decision in *California v. Ramos*, 463 U.S. 992 (1983), which was decided after *Gardner*, but before *Skipper*. The majority asserted that, in *Ramos*, "every Member of the Supreme Court apparently approved, as constitutionally permissible, the very practice later held unconstitutional in *Simmons*," and that, in light of *Ramos*, a reasonable jurist would have thought it "all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden." 95 F.3d at 1218, 1231-32. (J.A. 224, 258.)

According to the court of appeals majority, a reasonable jurist in 1988 would have been obliged to "reconcile" what the majority perceived as a "tension" between *Gardner* and *Skipper*, on the one hand, and *Ramos*, on the other hand. 95 F.3d 8 at 1232, 1234. (J.A. 259, 265.)[4] This "tension," the majority believed, could have been "reconcile[d]" by an "entirely reasonable" distinction between "fact" and "law":

[4] In support of its conclusion, the court of appeals majority also relied on this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), in which this Court held it unconstitutionally misleading for the prosecution to inform jurors that, due to the possibility of appellate review, they were not finally responsible for a death sentence. *Id.* at 335. The majority believed that *Caldwell*, like *Ramos*, stood in "tension" with the result later reached in *Simmons*, 95 F.3d at 1230-34 (J.A. 253-66), despite the fact that neither the plurality, concurring nor dissenting opinion in *Simmons* makes any reference to *Caldwell*.

> That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with relevant *factual evidence* about himself, his character, and his particular offense. . . .
>
> In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos* . . . as setting forth the principle that whether to instruct juries on state law . . . is a decision left to the "wisdom of . . . the States" by the Constitution.

95 F.3d at 1232-33 (quoting *Ramos*, 463 U.S. at 1014). (J.A. 260-62.) The Commonwealth never suggested this "fact/law" distinction in the proceedings below, and the majority cited no occasion on which any jurist ever actually entertained it.

Because, in the majority's view, a reasonable jurist in 1988 might not have thought that *Gardner* and *Skipper* compelled the result in *Simmons*, it concluded that *Simmons* announced a "new rule" within the meaning of *Teague*. 95 F.3d at 1237-38. (J.A. 276.) In addition, the majority held, the rule of *Simmons* does not fall within the second of two established exceptions to *Teague*, which allows for the retroactive application of procedural rules affecting the fundamental fairness and accuracy of criminal proceedings. 95 F.3d at 1239. (J.A. 276-78.)[5] The court

[5] The court of appeals majority stated in a footnote that "there are strong indications that even if [the failure to give the *Simmons* instruction] had been error, it would have been harmless," but it declined to rest its decision on this ground. 95 F.3d at 1239 n.14. (J.A. 278.)

of appeals unanimously rejected O'Dell's other claims. 95 F.3d at 1239-55. (J.A. 279-320.)

Six judges dissented from the majority's holding that *Simmons* announced a "new rule." 95 F.3d at 1256. (J.A. 321.) The dissenters believed that *Simmons* was logically compelled by *Gardner* and *Skipper*, noting that "[t]he similarity between the situation that confronted Skipper and Simmons is especially striking." 95 F.3d at 1258. (J.A. 328.) The dissent noted the *Simmons* plurality's statement that the prior cases "compel[led]" the *Simmons* decision; the "substantial majority" (7-2) by which *Simmons* was decided; and the fact that most states had, before *Simmons*, already rejected the practice which *Simmons* condemned. *Id.* at 1258-59. (J.A. 328-30.)

The dissent rejected the view that *Ramos* supported a result contrary to the one in *Simmons*. The dissenting judges noted that *Ramos* did not imply any limitation on a defendant's right to rebut a prosecutor's contentions; on the contrary, the *Ramos* Court upheld the statute before it expressly because the statute did not interfere with that right. *Id.* at 1259. (J.A. 331.)

Moreover, although the dissenters found no need to reach the question, they also stated their belief that, even if *Simmons* did announce a "new rule," a "strong argument" could be made that it falls within the second exception to *Teague*. 95 F.3d at 1261 n.11. (J.A. 336.) Finally, the dissenters agreed with the district court that the *Simmons* violation here had a "substantial and injurious effect or influence in determining the jury's verdict." 95 F.3d at 1261-62 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). (J.A. 337-40.)

On November 26, 1996, O'Dell filed a timely petition for certiorari. On December 19, 1996, this Court granted a writ of certiorari, limited to the issues of whether *Simmons* announced a new rule, and whether it falls within the second exception to *Teague*. 117 S. Ct. 631. (J.A. 345.)

SUMMARY OF THE ARGUMENT

1. Simmons *Did Not Announce a "New Rule."* A decision of this Court does not announce a "new rule," and may be applied to a final state-court conviction, if, at the time the conviction became final, a "reasonable jurist" would have thought that it was compelled by existing precedent. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the plurality opinion expressly stated that "[t]he principle announced in *Gardner* [and] reaffirmed in *Skipper . . . compels* our decision today." *Id.* at 165 (plurality opinion) (italics added). The concurrence in *Simmons*, although not actually using the verb "compel," also indicated that *Simmons* was not announcing a "new rule."

The *Simmons* plurality was correct in asserting that *Gardner v. Florida*, 430 U.S. 349 (1977), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), both decided before O'Dell's conviction became final in 1988, "compel[led]" the result in *Simmons*. In *Gardner*, this Court ruled that the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362 (plurality opinion). In *Skipper*, the Court explained that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty,"

"elemental due process require[s]" the admission of the defendant's relevant evidence in rebuttal. *Skipper*, 476 U.S. at 5 n.1 (citing *Gardner*, 430 U.S. at 362). The precise issue in *Skipper* – whether a defendant could introduce evidence of his good conduct in prison to rebut an allegation of future dangerousness – was close to, and in principle indistinguishable from, the issue later presented in *Simmons*.

A reasonable jurist in 1988 would not have thought that *California v. Ramos*, 463 U.S. 992 (1983), protected the practice later rejected in *Simmons*. *Ramos*, unlike *Skipper*, is obviously distinguishable from *Simmons*. As the *Ramos* Court itself pointed out, *Ramos* did not involve the "right to rebut" established by *Gardner* (and later applied in *Skipper*). Moreover, *Ramos* expressly recognized that a State's general discretion to determine what a jury may be told about sentencing is *limited* by *Gardner*'s due process right of rebuttal. The "fact/law" distinction suggested by the court of appeals majority as a basis for holding that *Ramos*, rather than *Gardner* and *Skipper*, controlled the *Simmons* situation is lacking in merit and was never advanced by any jurist prior to the court of appeals' ruling in this case.

No reasoned decision rendered after *Skipper* approved of the practice, condemned in *Simmons*, of barring a defendant from rebutting a charge of future dangerousness by advising the jury of his parole ineligibility. This confirms that the rule of *Simmons* was not new. Indeed, all federal courts that have considered the issue, except the court of appeals below, have held that *Simmons* did not announce a new rule.

2. Simmons *Falls Within the Second Exception to* Teague. The second exception to *Teague* allows for the retroactive application of "bedrock" procedural protections that implicate "the fundamental fairness and accuracy of the criminal proceeding." The practice condemned in *Simmons* was fundamentally unfair and an invitation to inaccurate jury determinations.

To ask a jury to assess a defendant's "future dangerousness" while withholding from the jury the truth as to whether the defendant will or will not be incarcerated for the rest of his life is a bizarre and indefensible procedure. It will inevitably result in the execution of people whom a correctly-informed jury would not have condemned to death. *Skipper* noted that "elemental due process require[s]" that a capital defendant be allowed to meet the case against him, *Skipper*, 476 U.S. at 5 n.1, and Justice O'Connor's concurrence in *Simmons* reiterated that this right is a "hallmark of due process," *Simmons*, 512 U.S. at 175. Those comments reflect the fundamental, "bedrock" nature of the right at issue in *Simmons* and here.

ARGUMENT

I.

SIMMONS DID NOT ANNOUNCE A NEW RULE FOR PURPOSES OF *TEAGUE*

A. *Gardner* and *Skipper* "Compel[led]" the Result in *Simmons*

A decision constitutes a "new rule" if it "breaks new ground or imposes a new obligation on the States." *Teague*

v. Lane, 489 U.S. 288, 301 (1989). By contrast, a rule is deemed not to be "new" if a reasonable jurist, in considering the petitioner's claim at the time the conviction became final, would have felt "*compelled* by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (italics added).

The plurality opinion in *Simmons*, joined by four Members of this Court, expressly stated that "[t]he principle announced in *Gardner* was reaffirmed in *Skipper*, and it *compels* our decision today." *Simmons*, 512 U.S. at 165 (plurality opinion of Justice Blackmun, joined by Justices Stevens, Souter and Ginsburg) (italics added). The *Simmons* plurality also found that:

> [t]he trial court's refusal to apprise the jury of information crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, *cannot be reconciled with our well-established precedents* interpreting the Due Process Clause.

Id. at 164 (italics added).[6]

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[6] Additional language in *Simmons* supports the conclusion that the result there was thought to be "compel[led]" by this Court's precedents. Thus, the plurality observed:

> An instruction directing the jury not to consider the defendant's likely conduct in prison would not have satisfied due process in *Skipper*, and, *for the same reasons*, the instruction issued by the trial court in this case does not satisfy due process.

Simmons, 512 U.S. at 171 (plurality opinion) (italics added; citation omitted). *See also id.* at 162 ("it is *clear* that the State

A concurring opinion in *Simmons*, joined by three other Members of this Court, although not actually using the verb "compel," indicated its agreement with the plurality on this point:

> "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain' [*requires* that the defendant be afforded an opportunity to introduce evidence on this point]."

Id. at 175 (opinion of Justice O'Connor, concurring in the judgment, joined by the Chief Justice and Justice Kennedy) (quoting *Skipper*, 476 U.S. at 5 n.1, and *Gardner*, 430 U.S. at 362) (bracketed material and ellipsis in original; italics added).[7]

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denied petitioner due process") (italics added). Similarly, a separate concurrence in *Simmons* expressed the view that an "additional, related principle" announced in the Court's previous Eighth Amendment decisions "*also compels* today's decision." *Id.* at 172 (opinion of Justice Souter, joined by Justice Stevens, concurring) (italics added).

[7] The dissent in *Simmons* also cited *Gardner* and *Skipper* for the proposition that a defendant in a capital sentencing proceeding has a due process right to "deny or explain" adverse information. 512 U.S. at 180 (opinion of Justice Scalia, joined by Justice Thomas, dissenting). The dissent found that principle inapplicable on the facts of *Simmons*, noting that the prosecutor in *Simmons* "did not *invite* the jury to believe that petitioner would be eligible for parole – he did not *mislead* the jury." *Id.* at 182. In the present case, the prosecutor *did* blatantly mislead the jury, dwelling on O'Dell's prior releases on parole and specifically emphasizing O'Dell's dangerousness "outside of

The plurality's statements that the result in *Simmons* was compelled by *Gardner* and *Skipper*, with which the concurrence agreed in substance, were dismissed by the court of appeals majority as "hortatory *dicta*." 95 F.3d at 1235. (J.A. 268.) The majority relied on this Court's admonition that:

> the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts.

Id. (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)).

The *Simmons* plurality, however, said more than that the result there was "within the 'logical compass,' " "controlled" or "governed" by this Court's precedents. It said that the result in *Simmons* was "compel[led]" by *Gardner* and *Skipper*. This is considerably more than "hortatory *dicta*." The conclusion is unavoidable that, at the time this Court considered the constitutional rule in *Simmons*, a majority of its Members believed that the pre-1988 precedents of *Gardner* and *Skipper* required its result. They were amply justified in that belief.

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the prison system." (*See* the excerpts from the prosecution's summation quoted *supra* pp. 2-3.) Thus, even on the analysis of the *Simmons* dissent, *Gardner* and *Skipper* would compel a result favorable to O'Dell in the present case.

In *Gardner*, the defendant was sentenced to death based in part on a pre-sentence report that was not made available to him, and therefore could not be rebutted. This Court ruled that the death sentence was invalid because the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362 (plurality opinion).

In *Skipper*, this Court applied this principle in a situation strikingly similar to the one presented in *Simmons*. In *Skipper*, the Court held that the defendant was denied due process by the refusal of the trial court in the capital sentencing phase to admit evidence of the defendant's good behavior in prison. The Court explained that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," "elemental due process require[s]" the admission of the defendant's relevant evidence in rebuttal. *Skipper*, 476 U.S. at 5 n.1 (citing *Gardner*, 430 U.S. at 362); *accord id.* at 9 (opinion of Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurring in the judgment).

In essence, *Simmons* presented a variation on the facts in *Skipper*. In *Simmons*, as in *Skipper*, the prosecution raised the issue of future dangerousness before the sentencing jury. In *Simmons*, the trial court refused to instruct the jury on the defendant's ineligibility for parole, and forbade defense counsel from presenting accurate information on the subject. Thus, while Skipper was denied the right to prove that he had behaved well in prison, and thereby suggest to the jury that he would not be dangerous if sentenced to life imprisonment, Simmons

sought to present to the jury the even more obviously relevant fact that he would actually be *in* prison, and not out on the street, for the rest of his life if sentenced to life imprisonment. As the dissent below said:

> The similarity between the situation that confronted Skipper and Simmons is especially striking. Surely a Constitution that entitles a defendant to rebut the prosecution's argument of future dangerousness with evidence of his good behavior in prison likewise entitles him to inform the jury that he will remain incarcerated for life. *Cf.* [*Skipper*, 476 U.S.] at 5 n.1. Thus, it would have been an illogical application of *Skipper* "to [have] decide[d] that it did not extend to the facts of" *Simmons*.

95 F.3d at 1258 (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)) (citations omitted; alterations in original). (J.A. 328.)

Indeed, even the court of appeals majority conceded that:

> Were *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

95 F.3d at 1225. (J.A. 241.)

B. A Reasonable Jurist in 1988 Would Not Have Thought That *Ramos* Supported the Practice Condemned in *Simmons*

Despite the "considerable force" of the argument that *Gardner* and *Skipper* "compel[led]" the result in *Simmons*, the court of appeals majority nevertheless concluded that

Simmons represented "the paradigmatic 'new rule,' " 95 F.3d at 1218 (J.A. 224), based principally on this Court's decision in *Ramos*. However, at the time that O'Dell's conviction became final in 1988, a reasonable jurist would not have thought that *Ramos* permitted the practice rejected by *Simmons*.

1. Ramos *Does Not Support a Result Contrary to the* Simmons *Holding.*

In *Ramos*, this Court upheld a California sentencing provision that permitted the trial court to advise the jury of the Governor's power to commute a life sentence, but did not require it to inform the jury of the Governor's power to commute a death sentence. *Ramos*, 463 U.S. at 994. The mere recital of this holding shows that *Ramos* is distinguishable from *Simmons*. The possibility that the Governor will commute a sentence of death is simply not comparable, in its potential impact on a sentencing jury, to a statutory guarantee that the defendant will never be paroled.

It is easy to imagine a jury that will vote for a death sentence because it thinks parole is a possibility;[8] it is

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[8] Only two death sentences have been imposed in Virginia for crimes committed after January 1, 1995 – down from ten death sentences in 1994 alone – a decline that has been attributed to the fact that Virginia juries must now be informed of the life-without-parole rule. *See* Frank Green, *Death Sentences Decline in Virginia*, Richmond Times-Dispatch, Nov. 24, 1996. (Pet. Appendix II 279a.) *See also* Benjamin P. Cooper, Note, *Truth in Sentencing: The Prospective and Retroactive Application of* Simmons v. South Carolina, 63 U. Chi. L. Rev. 1573, 1573 n.2

difficult, at best, to imagine a jury that will vote for a death sentence only because it is unaware of the Governor's commutation power. Indeed, the *Ramos* Court found that the information withheld in *Ramos* would have no bearing on the sentencing determination, stating: "A jury concerned about preventing the defendant's potential return to society will not be any less inclined to vote for the death penalty upon learning that even a death sentence may not have such an effect." *Id.* at 1011. Because the information withheld from the jury in *Ramos* was irrelevant to the issue of future dangerousness, while the information withheld in *Simmons* was critical, *Ramos* could furnish no basis for upholding the practice that *Simmons* rejected.

But even if the large difference between the *Ramos* facts (involving the commutation power) and the *Simmons* facts (involving the defendant's ineligibility for parole) were ignored, *Ramos* does not support a result contrary to the *Simmons* holding – because *Ramos*, unlike *Gardner*, *Skipper* and *Simmons*, did not involve a capital defendant's due process right of rebuttal.

Both the plurality and the concurrence in *Simmons* expressly based their holding on the defendant's right to *rebut* the prosecution's assertion that he would be dangerous in the future. The plurality opinion in *Simmons* states:

(1996) (citing evidence that jurors who believe that a "life sentence" carries the possibility of parole are more likely to sentence a defendant to death).

> Like the defendants in *Skipper* and *Gardner*, petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death. The State raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society.

Simmons, 512 U.S. at 165.

Similarly, the concurring opinion in *Simmons*, also relying on *Gardner* and *Skipper*, said it is a "hallmark of due process" that the defendant be entitled to "meet the State's case against him." *Id.* at 175 (O'Connor, J., concurring in the judgment). The concurrence concluded that:

> Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible.

Id. at 178.

The right of rebuttal that *Simmons* upholds is not questioned in any way in the *Ramos* decision. Indeed, the *Ramos* Court expressly recognized that a State's general discretion to determine what a jury may be told about sentencing is *limited* by the due process right of rebuttal upheld in *Gardner*. The *Ramos* Court (writing before *Skipper* was decided) distinguished *Gardner* as follows:

> Nor is there any diminution in the reliability of the sentencing decision of the kind condemned in *Gardner v. Florida*, 430 U.S. 349 (1977). . . . Because of the potential that the sentencer [in *Gardner*] might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed. *Gardner provides no support for [the defendant here]*. The Briggs Instruction gives the jury *accurate* information of which both the defendant and his counsel are aware, and *it does not preclude the defendant* from offering any evidence or argument regarding the Governor's power to commute a life sentence.

Ramos, 463 U.S. at 1004. (italics added; footnote omitted).

Thus, the *Ramos* Court held that the jury instruction at issue in *Ramos* did not violate *Gardner* because, although it provided the jury with information that might be helpful to the state – *i.e.*, that a defendant sentenced to life imprisonment without parole might still be released back into society through the Governor's exercise of the commutation power – the defendant was allowed to introduce his own rebuttal information regarding the Governor's use of that power. The holding of *Simmons* is that a defendant may rebut evidence of future dangerousness by showing that he will *not* be released back into society. *Ramos* and *Simmons* are thus entirely consistent. Indeed, *Ramos* foreshadows *Simmons* in that the *Ramos* Court recognized that information regarding a defendant's likelihood of future release into society is "inextricably linked" to questions of future dangerousness. *Id.* at 1003 n.17.

The court of appeals majority thus erred in concluding that, in *Ramos*, "every Member of the Supreme Court apparently approved, as constitutionally permissible, the very practice later held unconstitutional in *Simmons*." 95 F.3d at 1218. (J.A. 224.) The majority also erred in stating that, in light of *Ramos*, a reasonable jurist in 1988 would have thought it "all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden." 95 F.3d at 1231-32. (J.A. 258.)

As the dissent below correctly said:

> At bottom, *Simmons* examines whether a person who is subjected to the death penalty on future dangerousness grounds is entitled to rebut that argument with highly relevant evidence, not the presentation of a parole eligibility scheme to a jury. *Ramos*, on the other hand, involved the application of a more general rule concerning a state's discretion to offer or withhold the details of its commutation and early release systems. Because *Ramos* does not conflict with the more specific principle employed in *Simmons*, the *Simmons* Court could apply *Skipper* and *Gardner* without announcing a new rule of constitutional criminal procedure. . . .

95 F.3d at 1261 (citations omitted). (J.A. 335-36.)

2. *The "Fact/Law" Distinction Suggested by the Court of Appeals Majority Is Untenable.*

According to the court of appeals majority, a reasonable jurist "would have been obliged to reconcile" what the majority perceived as a "tension" between *Gardner* and *Skipper*, on the one hand, and *Ramos*, on the other

hand. 95 F.3d at 1232, 1234. (J.A. 259, 265.) The majority said that jurist could have found this "reconciliation" in an "entirely reasonable" "fact/law" distinction:

> That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with relevant *factual evidence* about himself, his character, and his particular offense. . . .
>
> In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos* . . . as setting forth the principle that whether to instruct juries on state law . . . is a decision left to the "wisdom of the . . . States" by the Constitution.

95 F.3d at 1232-33 (quoting *Ramos*, 463 U.S. at 1014). (J.A. 260-62.)

The members of the court of appeals majority are, so far as our research shows, the first jurists anywhere to perceive this supposed "tension" between *Gardner* and *Skipper*, on the one hand, and *Ramos*, on the other hand – let alone attempt to "reconcile" them on the basis of this "fact/law" distinction. The "fact/law" distinction was not urged by the Commonwealth below, and has never been suggested in any reported precedent.[9]

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[9] Asserting that the *Simmons* concurrence "recognized the very same distinction," 95 F.3d at 1234 (J.A. 266), the court of appeals majority pointed to the following passage:

> Unlike in *Skipper*, where the defendant sought to introduce *factual evidence* tending to disprove the State's showing of future dangerousness, [Simmons] sought to rely on the operation of *South Carolina's sentencing law* in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment.

Simmons, 512 U.S. at 176 (O'Connor, J., concurring in the judgment) (quoted at 95 F.3d at 1233-34 (J.A. 264)) (italics added by the court of appeals majority; citation omitted). The immediately following language, however, demonstrates that the *Simmons* concurrence meant to draw no such distinction and, indeed, viewed the sentencing "law" as a "fact" in the *Simmons* context:

> In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that *fact*. . . . When the State seeks to show the defendant's future dangerousness, however, the *fact* that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case.

Id. at 176-77 (italics added).

And for good reason. Far from being "entirely reasonable," the "fact/law" distinction posited by the court of appeals majority is completely artificial and, as applied to this case, meaningless. What O'Dell, like Simmons, wanted the jury to know was essential *factual* information – that, in truth, if given a life sentence, he would spend the rest of his life in prison. The relationship of this fact to the Virginia parole statute does not justify concealing it from the jury. The reason suggested by the majority – that the state of the law can "change with time," while facts cannot, 95 F.3d at 1234 (J.A. 264) – is simply mistaken. Facts are no less subject to future change than law. For example, good behavior – the "fact" at issue in *Skipper* –

is at least as likely as the life-without-parole statute at issue here and in *Simmons* to "change with time."

Denying O'Dell a remedy for the violation of his due process rights thus cannot be justified by the "fact/law" distinction. "The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents" based on an "objective" standard. *Stringer v. Black*, 503 U.S. 222, 237 (1992). As a result:

> To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be *meaningfully* distinguished from that established by binding precedent at the time his state court conviction became final. . . . If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful and any deviation from precedent is not reasonable.

Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment) (italics added).

The majority's reading of *Ramos* is not reasonable, and the "fact/law" distinction the majority would draw from it is not meaningful. *See Stringer*, 503 U.S. at 233-36 (rejecting an unreasonable interpretation of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), that would have been contrary to the later decision of *Clemons v. Mississippi*, 494 U.S. 738 (1990)). *Ramos* does not establish that *Simmons* announced a "new rule."

C. No Reasoned Decision After *Skipper* Approved of the Practice Condemned in *Simmons*

"[T]he mere existence of conflicting authority does not necessarily mean a rule is new." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment). As this Court has explained:

> The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents. Reasonableness, in this as in many other contexts, is an objective standard, and the ultimate decision whether [a decision] was dictated by precedent is based upon an objective reading of the relevant cases.

Stringer, 503 U.S. at 237 (holding a rule not to be "new" even where a federal appellate court had previously rejected it). Nevertheless, it is significant that, contrary to the suggestion of the court of appeals majority, 95 F.3d at 1236-37 (J.A. 269-74), there is no *reasoned* decision of any state or federal court after *Skipper* that upholds as consistent with due process the specific practice that occurred in Simmons' and O'Dell's trials, *i.e.*, the refusal to allow a capital defendant to rebut the prosecution's contention of future dangerousness with evidence of his statutory ineligibility for parole.

As this Court noted in *Simmons*, only three states – Pennsylvania, South Carolina and Virginia – instructed sentencing juries to choose between death and life imprisonment, without disclosing the fact that, if given a life sentence, the defendant would never be eligible for

parole. *Simmons*, 512 U.S. at 168 n.8.[10] Subsequent to *Skipper*, however, neither the Pennsylvania nor the South Carolina courts upheld as constitutional the specific injustice worked upon O'Dell. The Pennsylvania Supreme Court condoned the practice of refusing to instruct the jury on the defendant's parole ineligibility only in cases where the prosecutor had not made future dangerousness an issue. *See Commonwealth v. Henry*, 569 A.2d 929 (Pa. 1990), *cert. denied*, 499 U.S. 931 (1991); *Commonwealth v. Strong*, 563 A.2d 479 (Pa. 1989), *cert. denied*, 494 U.S. 1060 (1990). Conversely, the South Carolina Supreme Court, in *Simmons*, upheld the practice of permitting a prosecutor to argue the future dangerousness of a defendant who would never be released on parole only after concluding that the jury had been effectively advised of the defendant's parole ineligibility. *See State v. Simmons*, 427 S.E.2d 175, 178-79 (S.C. 1993), *rev'd*, 512 U.S. 154 (1994).

After *Skipper*, only Virginia countenanced the due process violation condemned in *Simmons*. *See Mickens v. Commonwealth*, 442 S.E.2d 678, 685 (Va.), *vacated and remanded for further consideration in light of Simmons*, 115 S. Ct. 307 (1994); *Mueller v. Commonwealth*, 422 S.E.2d 380, 394 (Va. 1992), *cert. denied*, 507 U.S. 1043 (1993); *Eaton v.*

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[10] Two additional states – North Carolina and Texas – also did not disclose information concerning parole eligibility to sentencing juries. *See Simmons*, 512 U.S. at 179 n.2 (Scalia, J., dissenting). At the time *Simmons* was decided, however, there was no life without parole in these states. *See State v. Price*, 448 S.E.2d 827, 831 (N.C. 1994), *cert. denied*, 115 S. Ct. 1368 (1995); *State v. Robinson*, 451 S.E.2d 196, 206 (N.C. 1994), *cert. denied*, 115 S. Ct. 2565 (1995); *Smith v. State*, 898 S.W.2d 838, 850 (Tex. Crim. App.), *cert. denied*, 116 S. Ct. 131 (1995).

Commonwealth, 397 S.E.2d 385, 393 n.1 (Va. 1990), *cert. denied*, 502 U.S. 824 (1991); and the affirmance of O'Dell's conviction on direct appeal in this case, *O'Dell v. Commonwealth*, 364 S.E.2d 491, 507 (Va. 1988) (J.A. 108), *cert. denied*, 488 U.S. 871 (1988).[11] In these cases, the Virginia Supreme Court simply cited to its prior rulings in distinguishable cases, and did not even refer to this Court's decision in *Skipper*. Other than the decisions below, no federal court appears to have addressed the specific practice at issue here with respect to a conviction that became final after *Skipper*.[12] By contrast, the only post-*Skipper*, pre-*Simmons* court that gave real consideration to the issue presaged the holding of *Simmons* by holding that refusing to advise a capital sentencing jury of the defendant's parole ineligibility *does* violate due process. *See Turner v. State*, 573 So. 2d 657, 673-75 (Miss. 1990), *cert. denied*, 500 U.S. 910 (1991); *see also State v. Henderson*, 789 P.2d 603, 606-07 (N.M. 1990) (same where the defendant would be parole ineligible for thirty years).

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[11] The defendants in *Mueller* and *Eaton* have raised the retroactive application of *Simmons* in state and federal habeas proceedings, respectively.

[12] Several decisions from federal courts of appeals are distinguishable because they all involved defendants who could have become eligible for parole. *See Knox v. Collins*, 928 F.2d 657, 660 (5th Cir. 1991) (defendant eligible for parole after 20 years); *Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir.) (same), *cert. denied*, 498 U.S. 992 (1990); *King v. Lynaugh*, 850 F.2d 1055, 1057-58 (5th Cir. 1988) (same), *cert. denied*, 488 U.S. 1019, *and cert. denied*, 489 U.S. 1093 (1989); *see also United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993) (holding that jury in federal capital prosecution need not be informed that life without parole is a "possibility"), *cert. denied*, 114 S. Ct. 2724 (1994).

It is small wonder that no reasoned decision after *Skipper* attempts to justify the practice that *Simmons* condemned – the practice of forcing a jury to decide the issue of future dangerousness in ignorance of the fact that the defendant is facing life without parole. The practice is impossible to justify. The *Simmons* plurality described its patent unfairness:

> [T]he jury may have reasonably believed that petitioner could have been released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misconception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he was not executed. . . . The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied due process.

Simmons, 512 U.S. at 161-62 (plurality opinion).

Indeed, the prosecution here employed an even more egregious tactic than in *Simmons*. The Commonwealth dwelt on O'Dell's record of criminal behavior while on parole to create a false, yet irrebuttable, impression that only a death sentence could prevent his being paroled to

kill again. It then argued to the jury that "[n]othing has stopped" O'Dell – and nothing except the death penalty ever would. (*See supra* p. 3.) The unfairness of such a procedure is obvious, and there is no reasoned decision by any court anywhere that approves of it. There *never* was a time when any reasonable jurist would have thought it fair to condemn a person to death in such a manner.

D. All Other Federal Decisions That Have Addressed the Issue Hold That *Simmons* Did Not Announce a "New Rule"

Every federal court that has addressed the issue, except the court of appeals here, has agreed with the express view of the *Simmons* plurality that the result in *Simmons* was "compel[led]" by *Gardner* and *Skipper*. *See Spreitzer v. Peters*, 1996 WL 48585, at *5-*6 (N.D. Ill. Feb. 5, 1996) ("*Skipper* not only left little doubt that a capital defendant has the right to present his sentencer with any and all evidence that might mitigate his punishment, but was also very clear that testimony regarding a defendant's probable future conduct was such evidence. . . . This court is confident that had the Illinois courts carefully considered the constitutional dimensions of [petitioner's] due process claim, they would have reached the same conclusion."); *Carpenter v. Vaughn*, 888 F. Supp. 658, 666 (M.D. Pa. 1995) ("The holding of *Simmons* plainly was dictated by" *Gardner* and *Skipper*.); *O'Dell v. Thompson*, No. 3:92CV480 (E.D. Va. Sept. 6, 1994) (district court decision below) ("There is no question that the precedents guiding the Court's analysis in *Simmons* were well established. . . . [T]he application of those precedents was

also well-established. . . . ") (J.A. 199); *see also Stewart v. Lane*, 60 F.3d 296, 302 n.4 (7th Cir. 1995) ("it is arguable that *Skipper* compels the result in *Simmons*") (dicta), *supplemented*, 70 F.3d 955, *cert. denied*, 116 S. Ct. 2580 (1996).[13]

* * *

The court of appeals' holding that *Simmons* announced a "new rule" should be reversed.[14]

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[13] Although some federal decisions have declined to apply *Simmons* retroactively, they involved cases where the petitioner's conviction became final prior to *Skipper*, *see Stewart*, 60 F.3d at 302 n.4, or the petitioner sought an extension of the holding in *Simmons*, *see Ingram v. Zant*, 26 F.3d 1047, 1054 n.5 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1137 (1995); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.), *cert. denied*, 115 S. Ct. 660 (1994); *Allridge v. Scott*, 41 F.3d 213, 222 n.11 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1959 (1995); *Johnson v. Scott*, 68 F.3d 106, 111 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1358 (1996); *Townes v. Murray*, 68 F.3d 840, 847-48 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 831 (1996).

In addition, two state-court decisions have held that *Simmons* is not retroactively applicable. In *Mueller v. Murray*, 478 S.E.2d 542 (Va. 1996), the Virginia court simply adopted the view of the court of appeals majority in this case, without any independent analysis or discussion. *See id.* at 548. In *Commonwealth v. Christy*, 656 A.2d 877 (Pa.), *cert. denied*, 116 S. Ct. 194 (1995), the Pennsylvania court concluded that, even if *Simmons* were compelled by this Court's precedents, it nevertheless announced a "new rule" under Pennsylvania law. *Id.* at 889 n.22. This holding was later rejected by a federal court in Pennsylvania. *Banks v. Horn*, 928 F. Supp. 512, 518-19 (M.D. Pa. 1996). The question of *Simmons*' retroactivity is a question of federal law. *See Yates v. Aiken*, 484 U.S. 211, 217-18 (1988).

[14] This Court's most recent decision interpreting *Teague*, *Gray v. Netherland*, 116 S. Ct. 2074 (1996), does not support a contrary result. In *Gray*, this Court held, 5-4, that requiring the prosecution to give adequate notice of evidence of future dangerousness that it intends to use in a capital sentencing proceeding would constitute a "new rule" under *Teague*. *Id.* at 2083-84. This rule is clearly different from the one at issue here and in *Simmons*: the asserted right to receive *notice* of evidence was not established by any prior cases, but the due process right to *rebut* such evidence was established by *Gardner* and *Skipper*.

II.

SIMMONS FALLS WITHIN THE SECOND EXCEPTION TO *TEAGUE*

Even if a decision announces a "new rule," it may nevertheless be applied retroactively if it falls within one of two established exceptions to *Teague*. The second of these exceptions allows for the retroactive application of "bedrock" procedural protections that implicate "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495 (1989), and without which "the likelihood of an accurate conviction is seriously diminished," *Teague*, 489 U.S. at 311-13. The rule in *Simmons* is such a "bedrock" procedural protection.

The practice condemned in *Simmons* is a shocking one, viewed from the perspective of simple and basic fairness. How can a defendant get a fair trial on the issue of "future dangerousness" if he is not allowed to inform the jury accurately about whether he will spend his future years in prison? Indeed, it is hard to imagine evidence much *more* relevant to the future dangerousness of a convicted murderer than whether he is or is not eligible for parole. To hold a trial on that issue in which such a basic fact is concealed from the jury is like putting on *Hamlet* without Hamlet, or ignoring an elephant in the living room.

Simmons held that this practice is unconstitutional because, as the concurrence in *Simmons* observed, it is a "hallmark[] of due process" that a defendant be entitled to "meet the State's case against him." *Simmons*, 512 U.S. at 175 (O'Connor, J., concurring in the judgment). *Simmons* was predicated on the view that, where a prosecutor has raised the issue of future dangerousness, if the defendant is not permitted to rebut by presenting accurate information about his parole ineligibility, it is much less likely that the sentencing jury will decide the dangerousness issue accurately. The rule in *Simmons* is essential to protect a capital defendant against a misinformed and mistaken decision that could cost him his life, and is therefore within the second exception to *Teague*. As the dissent in the court of appeals stated:

> a strong argument could be made that when a state undertakes to impose a death sentence solely on the ground that a capital defendant poses a further danger, "fundamental fairness and the accuracy of the criminal proceeding" demand that he not be precluded from showing that he was, by virtue of the law of that state, parole ineligible.

95 F.3d at 1261 n.11 (quoting *Parks*, 494 U.S. at 495). (J.A. 336.)[15]

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[15] In light of conclusion that *Simmons* did not announce a "new rule," the dissent in the court of appeals did not find it necessary to resolve the applicability of the second *Teague* exception. 95 F.3d at 1261 n.11 (J.A. 336).

The court of appeals majority cursorily dismissed the second *Teague* exception claim with the remark that *Simmons* is not "on par" with a decision like *Gideon v. Wainwright*, 372 U.S. 335 (1963). 95 F.3d at 1239. (J.A. 277.) But *Simmons* is "on par" with *Gideon* in the relevant respect: both cases rest upon this Court's belief that certain procedural protections are essential to prevent a miscarriage of justice. *Compare, e.g., Williams v. Dixon*, 961 F.2d 448, 454-56 (4th Cir.) (rule forbidding unanimity requirement for jury finding of mitigating circumstances falls within the second *Teague* exception), *cert. denied*, 506 U.S. 991 (1992); *Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994) (rule invalidating faulty reasonable-doubt instruction falls within second *Teague* exception); *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 2281 (1995). It is true that *Simmons* affects many fewer cases than *Gideon*, but that is no reason for refusing to apply *Simmons* retroactively. The second *Teague* exception exists despite, not because of, the extent of the disruption it causes to established practices.

As five judges of the Eleventh Circuit explained in concluding that the rule of *Gardner* falls within the second exception to *Teague*:

> *Teague* provides for retroactive application of "accuracy-enhancing procedural rules" which implicate the "bedrock procedural elements" of a criminal conviction. . . . The principle enunciated in *Gardner* is clearly such a rule. This rule is meant to provide for better fact-finding through adversarial procedure. *Gardner* allows crucial information to be clarified and supplemented. The result is that the sentencer has an improved

> and more accurate view of the facts upon which the sentence should be based.

Moore v. Zant, 885 F.2d 1497, 1525 (11th Cir. 1989) (*en banc*) (Johnson, J., dissenting), *cert. denied*, 497 U.S. 1010 (1990); *see also id.* at 1521 (Kravitch, J., dissenting) (*Gardner* is "based on the right of confrontation, and our adversarial system – unlike the inquisitorial method – depends above all else upon the right of confrontation to arrive at an accurate result.").[16]

Even more than *Gardner*, *Simmons* implicates the "fundamental fairness and accuracy of the criminal proceeding." The court of appeals erred in holding to the contrary.

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[16] In *Moore*, there was no majority opinion of the *en banc* court, and the plurality opinion did not address the question whether the rule of *Gardner* falls within the second exception to *Teague*. *Moore*, 885 F.2d at 1503 n.9, 1513 (plurality opinion).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded with instructions to grant the writ of habeas corpus.

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Respectfully submitted,

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